NO. 12-10-00004-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JUSTIN JOELEE WALLS, APPELLANT	***§***	***APPEAL FROM THE THIRD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Justin Joelee[1] Walls appeals his conviction for assault causing bodily injury–family violence, enhanced. Appellant pleaded "not guilty," and the case proceeded to a jury trial. On appeal, Appellant raises three issues. We affirm.

BACKGROUND

Appellant was charged by indictment with the offense of assault causing bodily injury–family violence[2] against a member of his household or a person with whom he has or has had a dating relationship.[3] The State also alleged that Appellant had previously been convicted of an offense under Chapter 22 of the Texas Penal Code against a member of his family, household,

[1] In the record, Appellant's middle name was spelled variously as "Jolee" and "Joelee."

[2] A person commits an offense if he intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse. *See* TEX. PENAL CODE ANN. § 22.01(a)(1) (West 2011).

[3] "Family violence" means an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault, or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself. *See* TEX. FAM. CODE ANN. § 71.004(1) (West 2008).

or a person with whom he has or has had a dating relationship.[4] Further, the State added a felony enhancement paragraph, raising the offense to a second degree felony.[5] Appellant pleaded "not guilty," and the case proceeded to a jury trial.

At trial, Corporal Lee Duren, a patrol officer with the Anderson County Sheriff's office, testified that he took photographs of the victim's injuries on September 18, 2008, approximately six days after the alleged incident. Photographs of the victim were admitted into evidence. According to Duren, the photographs show that the victim had two black eyes, bruises on her right cheek, lower right cheek and jaw area, scabbing on the right side of her mouth, bruises under the left side of her chin, and scabbing from the corner of the left side of her mouth down her left cheek. He stated that the photographs show that the victim had a bruise on her left forearm, which he characterized as a defensive injury. Duren also testified that the white portions of both of the victim's eyes were still red with blood caused by petechial hemorrhaging. He stated that petechial hemorrhaging is caused by blunt force trauma to the head.

The victim's uncle, who admitted being on parole for murder, testified that on September 13, 2008, he received a telephone call from his niece. He stated that at that time, she was living in a mobile home with Appellant. According to the victim's uncle, the victim was very upset, sobbing, hysterical, and "stressed out." Over Appellant's running objection of hearsay, the victim's uncle stated that she asked him to come and get her. He testified that when he met her at a gas station, she was "in pathetic shape," upset and crying. Further, he stated her physical condition was much worse than that portrayed by the photographs taken by the police. Specifically, the victim's uncle testified that her eyes were blacker, the entire whites of her eyes were covered in blood, "all the way around," and her whole face was "black and blue." The victim told him that Appellant stuck his fingers in her mouth, calling it a "fish hook," and slapped her with open palms on both sides of her head beside her eyes. The victim's uncle took her to her mother's house. Five days later, the victim went to law enforcement after he convinced her to do

[4] An offense under Section 22.01(a) is a third degree felony if the offense is committed against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, if it is shown on the trial of the offense that the defendant has been previously convicted of an offense under Chapter 22, against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005. *See* TEX. PENAL CODE ANN. § 22.01(b)(2)(A) (West 2011).

[5] If it is shown on the trial of a third degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a second degree felony. *See* TEX. PENAL CODE ANN. § 12.42(a)(3) (West 2011).

so.

The victim's mother testified that when the victim arrived at her house, she had a black eye or two, one of her eyes was red and bloody looking, her mouth was swollen and red, and she had bruises all over. She also confirmed that Appellant and the victim had been living together.

The victim testified that, in September 2008, she and her daughter were living with Appellant in a mobile home in Palestine, Texas. When Hurricane Ike began heading towards Palestine, Appellant and the victim began drinking. The victim testified she did not remember "all that night" because they had been drinking. According to the victim, all she could recall was that she and Appellant argued, and she left. After reviewing her written statement made to law enforcement, she testified that she and Appellant argued because she wanted to leave in order to go to her mother's house, partially because of the hurricane. But Appellant did not want her to leave. The victim testified that Appellant did not try to stop her from leaving even though in her statement, she said that Appellant attacked her as she prepared to leave the mobile home. She said that her statement was not "exactly" what had happened.

The victim's written statement to law enforcement was admitted into evidence. In the statement, the victim alleged that Appellant "attacked me[,] threw me on the ground[,] started choking me and hitting me in my face[, p]utting his fingers in my mouth pulling and stretching my mouth until he decided to quit." Although she admitted that she wrote the statement, she testified that she could not remember the alleged incident. However, when the State asked the victim how she received the injuries shown in the photographs admitted into evidence, she stated that Appellant inflicted those injuries. She then testified that she could not recall how Appellant caused her injuries. Later, she conceded that although she did not recall how Appellant inflicted her injuries, "it's in my paperwork," evidently referring to her written statement.

On cross-examination, the victim agreed, contrary to her written statement and previous comments about the injuries she sustained, that Appellant "never touched" her. The victim also agreed that she "could have fallen and somehow received injuries from falling while intoxicated." She testified that she never left the mobile home after the alleged incident. The victim also admitted being scared of her uncle, and testified that he forced her into making the written statement to law enforcement. Further, she stated that her uncle and mother lied if they testified that they saw her two days after the alleged incident. The victim admitted that she and Appellant were living together, that she was not working, that Appellant supported her and her daughter, and

that she filed an affidavit of nonprosecution. Throughout the victim's testimony, she stated that she did not remember what had occurred because of the passage of time before trial. Further, she continued to obfuscate the facts and deny what she had previously written in her statement.

Joseph E. Willis, an investigator with a special prosecution unit, testified through fingerprint identification that Appellant is the same person who was previously convicted of assault–family violence in Denton County, Texas.

At the conclusion of trial, the jury found Appellant guilty of assault causing bodily injury–family violence, enhanced, and assessed his punishment at fifteen years of imprisonment and a $5,000.00 fine.[6] This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Appellant challenges the factual sufficiency of the evidence supporting his conviction of assault causing bodily injury–family violence.

Standard of Review

The Texas Court of Criminal Appeals recently held that the ***Jackson v. Virginia*** legal sufficiency standard is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt. *See* ***Brooks v. State***, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010) (plurality op.). Appellant did not have the benefit of the court of criminal appeals' opinion in ***Brooks*** at the time he submitted his brief raising only the issue of factual sufficiency. Accordingly, we construe Appellant's issue liberally in the interest of justice and review it under the ***Jackson*** standard. *See, e.g.*, ***White v. State***, 50 S.W.3d 31, 40 (Tex. App.–Waco 2001, pet. ref'd).

Under this single sufficiency standard, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We defer to the trier of fact's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from basic facts to ultimate facts. ***Jackson***, 443 U.S. at 319, 99 S. Ct at

[6] An individual adjudged guilty of a second degree felony shall be punished by imprisonment for any term of not more than twenty years or less than two years and, in addition, a fine not to exceed $10,000.00. TEX. PENAL CODE ANN. § 12.33 (West 2011).

2789; ***Hooper***, 214 S.W.3d at 13. The jury is entitled to accept one version of the facts and reject another version or any portion of a witness's testimony. ***Penagraph v. State***, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). Every fact does not need to point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Hooper***, 214 S.W.3d at 13. Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and may alone be sufficient to establish guilt. ***Id***. On appeal, the same standard of review is used for both circumstantial and direct evidence cases. ***Id***.

Applicable Law

To obtain a conviction for assault causing bodily injury–family violence, the State was required to prove beyond a reasonable doubt that Appellant intentionally, knowingly, or recklessly caused bodily injury to the victim. *See* TEX. PENAL CODE ANN. § 22.01(a)(1) (West 2011). A person acts intentionally with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. ***Id.*** § 6.03(a) (West 2011).

Discussion

Viewing the evidence in the light most favorable to the jury's finding of guilt, the victim admitted that Appellant inflicted the injuries shown in the photographs admitted at trial. In her written statement to law enforcement, the victim stated that Appellant "attacked me[,] threw me on the ground[,] started choking me and hitting me in my face[, p]utting his fingers in my mouth pulling and stretching my mouth until he decided to quit." The victim's uncle testified that she told him Appellant stuck his fingers in her mouth, "fishhook[ing] her," and slapped her on both sides of her head beside her eyes. Duren and the victim's uncle and mother described the victim's injuries, stating that both of her eyes were black, the white portions of both of her eyes were red with blood, her mouth was red, and her cheeks and jaw were bruised and scabbed. Duren testified that the petechial hemorrhaging in the victim's eyes was caused by blunt force trauma to the head.

Based upon the cumulative force of this evidence, the jury could have reasonably found that Appellant caused bodily injury to the victim by inflicting extensive bruises, petechial hemorrhaging in her eyes, and scratches on her face. However, the victim also testified that she could not recall the alleged incident, denied that Appellant touched her, and stated that she was forced to make the written statement to law enforcement by her uncle. She also testified that she

never saw her uncle or mother after the alleged incident, stating that she never left the mobile home. This testimony suggests that Appellant did not injure the victim or cause her injuries. Although this evidence is contrary to the jury's finding of guilt, we defer to the jury to resolve any conflicts in the testimony, to weigh the evidence, and to draw inferences. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; ***Hooper***, 214 S.W.3d at 13. Further, the jury was entitled to disbelieve, and reject, the victim's contradictory testimony, particularly as the victim admitted that she and Appellant were living together, and that Appellant supported her and her daughter. *See* ***Penagraph***, 623 S.W.2d at 343.

Based upon our review of the evidence in the light most favorable to the verdict, we conclude that the jury could have found the essential elements of the offense of assault causing bodily injury–family violence beyond a reasonable doubt. Therefore, the evidence is legally sufficient to support the jury's finding of guilt. We overrule Appellant's first issue.

ADMISSION OF HEARSAY TESTIMONY

In his second issue, Appellant contends the trial court abused its discretion by admitting testimony under the excited utterance exception to the hearsay rule. Specifically, Appellant argues that the excited utterance exception is inapplicable in this case.

Applicable Law

A trial court's ruling on the admission of a statement is reviewed under an abuse of discretion standard, and will be upheld if the trial court's decision is within "the zone of reasonable disagreement." ***Salazar v. State***, 38 S.W.3d 141, 154 (Tex. Crim. App. 2001) (quoting ***Montgomery v. State***, 810 S.W.2d 372, 390-91 (Tex. Crim. App. 1990) (op. on reh'g.)).

A "statement" is an oral or written verbal expression. TEX. R. EVID. 801(a). "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(d). Hearsay is not admissible except as provided by statute or by the rules of evidence or by other rules prescribed pursuant to statutory authority. TEX. R. EVID. 802. However, an exception to the hearsay rule is an "excited utterance." TEX. R. EVID. 803(2). An "excited utterance" is defined as a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. TEX. R. EVID. 803(2). The rationale for the excited utterance exception is "a psychological one, namely, the fact that when a man is in the

instant grip of violent emotion, excitement or pain, he ordinarily loses the capacity for *reflection* necessary to the fabrication of a falsehood and the 'truth will come out.'" ***Zuliani v. State***, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003) (emphasis in original) (quoting ***Evans v. State***, 480 S.W.2d 387, 389 (Tex. Crim. App. 1972)). As the ***Zuliani*** court explained, "the statement is trustworthy because it represents an event speaking through the person rather than the person speaking about the event." ***Id***.

The passage of time between the startling event and the statement is not dispositive of a statement's admissibility under the excited utterance exception, but is only a factor to consider. ***Salazar***, 38 S.W.3d at 154; ***Zuliani***, 97 S.W.3d at 595-96. Rather, the critical determination is "whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event" or condition at the time of the statement. ***Salazar***, 38 S.W.3d at 154 (quoting ***McFarland v. State***, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992)). A reviewing court must determine whether the statement was made "under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection." ***Zuliani***, 97 S.W.3d at 596 (quoting ***Fowler v. State***, 379 S.W.2d 345, 347 (Tex. Crim. App. 1964)). The court of criminal appeals stated that

> [a] useful rule of thumb is that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process. Testimony that the declarant still appeared "nervous" or "distraught" and that there was a reasonable basis for continuing emotional upset will often suffice.

Apolinar v. State, 155 S.W.3d 184, 189 (Tex. Crim. App. 2005) (quoting 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 272, at 207-08 (5th ed. 1999)).

Discussion

When the State asked the victim's uncle if the victim told him what her telephone call was about, Appellant objected, alleging this testimony violated the hearsay rule. The State responded that this testimony would be an excited utterance exception to the hearsay rule. The trial court overruled Appellant's objection, but granted Appellant's request for a running objection to all of the statements made by the victim's uncle.

The victim's uncle testified that while he was driving to pick her up, he told the victim that because he was on parole, "[i]f you had anything happen to you, let me know now because I don't want to be put in a situation to where I have to do something whenever I see your physical

condition, you know." At that point, the victim told him to "hold on." Then, she called him back and told him to meet her at a gas station. Earlier, the victim's uncle testified that when the victim initially called him, she was very upset, sobbing, hysterical, and "stressed out." When the State asked if she sounded excited, he stated, "No, she wasn't excited." But he agreed that she was "very upset."

The gravamen of the excited utterance hearsay exception is that, due to the immediacy and the excitement of the situation, the law presumes a person is less likely to concoct a lie. *See* ***Zuliani***, 97 S.W.3d at 595. Thus, what is spoken is more likely to be true, due to the declarant's making a comment in the emotion of the moment. *See* ***id***. Here, a day had elapsed between the assault and the victim's meeting her uncle. Further, after his conversation with her while driving to pick her up, she hung up, and after a period of time, called him back and agreed to meet him. This lapse of time is but a factor to be considered in determining whether the statement is admissible under the excited utterance hearsay exception. *See* ***Salazar***, 38 S.W.3d at 154.

The victim's uncle testified that the victim was not "excited," just "very upset." However, his statement that the victim was not excited does not defeat the admissibility of his statement that she accused Appellant of causing her injuries. Testimony that the declarant still appeared nervous or distraught, and a reasonable connection between the statement and a continuing emotional upset, may be proof that the declarant did not engage in a reflective thought process. *See* ***Apolinar***, 155 S.W.3d at 189. The victim's uncle testified that in her initial telephone call, she was very upset, sobbing, hysterical, and "stressed out." Further, he stated that when they met, she was still upset, crying and sobbing, before telling him that Appellant inflicted the injuries she suffered. The victim still appeared to be dominated by the "emotions, excitement, fear, or pain" of the event. *See* ***Zuliani***, 97 S.W.3d at 596. Therefore, we cannot say that the trial court's ruling that the victim's uncle's statement should be admitted as an excited utterance was outside the zone of reasonable disagreement.

However, even if the trial court erred in admitting the victim's uncle's statement, any such error is harmless. Erroneously admitting evidence "will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling." ***Coble v. State***, 330 S.W.3d 253, 282 (Tex. Crim. App. 2010) (quoting ***Leday v. State***, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998)). In other words, an error in the admission of evidence is harmless if substantially the same evidence is admitted elsewhere without objection. *See* ***Mayes v. State***, 816

S.W.2d 79, 88 (Tex. Crim. App. 1991); ***Prieto v. State***, 337 S.W.3d 918, 922 (Tex. App.–Amarillo 2011, pet. ref'd). In this case, the victim admitted that Appellant caused her injuries shown in the photographs admitted into evidence. Further, in her written statement admitted into evidence, she stated that Appellant threw her to the ground, choked her, hit her in the face, and pulled and stretched her mouth. Because the evidence admitted without objection was substantially the same as the statement by the victim's uncle, any error in admitting the statement by the victim's uncle is harmless. *See* ***Mayes***, 816 S.W.2d at 88; ***Prieto***, 337 S.W.3d at 922.

We overrule Appellant's second issue.

AFFIRMATIVE FINDING OF FAMILY VIOLENCE

In his third issue, Appellant argues that the trial court failed to make an affirmative finding of "family violence" in the judgment. As a result, he contends, the penalty for his conviction should have been the penalty for a Class A misdemeanor.

Article 42.013 provides that if the court determines the offense involved family violence, the court shall make an affirmative finding of that fact and enter the affirmative finding in the judgment of the case. TEX. CODE CRIM. PROC. ANN. art. 42.013 (West 2006). An appellate court has the authority to reform a judgment to include an affirmative finding to make the record speak the truth when it has the necessary information to do so. ***French v. State***, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *see also* ***Garcia-Hernandez v. State***, No. 05-08-00735-CR, 2009 WL 824766, at *4 (Tex. App.–Dallas Mar. 31, 2009, no pet.) (mem. op., not designated for publication).

In this case, the record shows that the indictment contained an allegation that Appellant committed an assault against a member of his household or a person with whom he has or has had a dating relationship. At trial, the victim, her uncle, and her mother testified that at the time of the incident, the victim and her daughter lived with Appellant. Further, the victim, her uncle, and her mother testified that the victim was living with Appellant at the time of trial. The verdict states that the jury found Appellant guilty of "assault causing bodily injury–family violence enhanced, as charged in the indictment." At the conclusion of the punishment phase, the trial court accepted the guilty verdict of the jury. Similarly, the judgment recites that Appellant was convicted of "assault causing bodily injury–family violence enhanced." However, the written judgment does not contain any language memorializing a finding of family violence as required by Article

42.013. Because the record is clear, we hold that the judgment should be reformed to reflect an affirmative finding of family violence. *See* ***French***, 830 S.W.2d at 609; ***Garcia-Hernandez***, 2009 WL 824766, at *4.

We overrule Appellant's third issue.

DISPOSITION

We ***modify*** the trial court's judgment to reflect an affirmative finding that the offense involved family violence, as defined by Section 71.004 of the Texas Family Code. As ***modified***, we ***affirm*** the trial court's judgment.

SAM GRIFFITH
Justice

Opinion delivered August 31, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)